Nos. 10,547 - 10,548

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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William R. Wallace, Jr.,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.

(CONSOLIDATED CASES)

Ina Claire Wallace,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Before proceeding to a discussion of the argument and of the authorities cited in the Respondent's Brief, it would perhaps be well to correct a number of inadvertent erroneous factual statements which have somewhat misled the Respondent. The first has to do with the apartment leased by Petitioner Ina Claire Wallace in New York City. That apartment at 3 East 69th Street in New York City was leased in the fall of 1938 for a three-year period. (R. p. 160.) It was to that apartment that the Petitioner intended to return after making the picture for which

she was engaged in Los Angeles. (R. p. 125.) The apartment was completely furnished and was just ready for occupancy when the Petitioner left for Los Angeles. During the subsequent three-year period from November 1938 to November 1941, the apartment was sublet for a portion of the time. She did not, therefore, as suggested in the Respondent's Brief at page 13, "give up" her apartment in New York City after coming to Hollywood. At page 11, the Respondent remarks that Mrs. Wallace "did not renew the lease of her New York apartment". The lease of the apartment continued throughout the taxable year and for two years thereafter, so there was no occasion to "renew" it. The Petitioner intended to return to that apartment until she changed her mind upon her marriage.

At page 15 of his Brief, the Respondent states:

> "The conclusion seems inescapable that only Hollywood could have been the regular place of business and statutory home of Ina Claire Wallace during the entire period from November, 1938 to September, 1939 that her contract required her presence there, since she gave up her New York activities and apartment, carried on her business and maintained her living quarters in Hollywood throughout this period, and did not go to San Francisco to live until her Hollywood employment was over."

The errors in that statement are, 1st: "Regular place of business" and "statutory home" are not synonymous terms. As pointed out in our Opening Brief, Mrs. Wallace's "regular place of business" after March 16th was San Francisco even though there-

after her place of employment for a portion of the time was in Hollywood; 2nd: Her contract did not require her presence in Hollywood, but required that she be "available" (R. p. 61); 3rd: Her "home" in San Francisco was acquired March 16, 1939 and she first resided in it from April 1st to May 1st, 1939. She was actually away from Hollywood March, April an ~~and May~~ and for four or five weeks commencing the first of July. (R. pp. 106, 110.) She did not give up her New York apartment. She did carry on business and maintain her home in San Francisco during this entire period and she did actually reside in her home in San Francisco and carry on business there during the months of April, July, half of September, and all of November and December. To refer to "prior Hollywood expenses" incurred before the San Francisco "home" was acquired is to misstate the fact.

On page 4 of the Respondent's Brief, it is remarked that Mrs. Wallace "remained in Hollywood until the termination of her contract with Loew's Inc." As pointed out above, that statement is incorrect. The total amount of time spent by the Petitioner Ina Claire Wallace in and about Los Angeles during the taxable year was approximately six months and the time consumed in the making of pictures was approximately three and one-half months. She was engaged to do a particular picture, and, as the studio was not able to say when the making of that picture would start, her salary was based upon her normal theatrical season's earnings and for convenience was paid over a period of thirty-four weeks, so that she would be available whenever the studio

was ready to make the picture. She also agreed to make other pictures if they met with her approval and actually did work two weeks on another picture which was not completed. (R. pp. 109, 112.)

These errors of fact seem so fundamental as to vitiate Respondent's argument.

In the following pages we will discuss that argument as it affects the various points in the Petitioners' Opening Brief.

ARGUMENT.

In the Brief heretofore filed by the Petitioners, the argument of Petitioners was divided into five parts.

I. The second of those parts was entitled as follows:

> "2. THE PETITIONER INA CLAIRE WALLACE HAS A PLACE OF BUSINESS AT HER HOME AND RESIDENCE IN SAN FRANCISCO."

The Respondent makes no specific reference to that portion of the Petitioners' Brief, and we may therefore dispose of it before proceeding with the controverted points of discussion. The point being uncontroverted we assume that the Respondent is in agreement with the Petitioners' position in that respect. However, a brief restatement of that position may be proper.

It is agreed that prior to March 16th, 1939, the legal residence, domicile and "home", as that word is ordinarily used, of the Petitioner Ina Claire Wallace was New York City. It is also agreed that after March 16, 1939, the legal residence, domicile and "home" of that Petitioner was San Francisco. Of the period of nine and one-half months—from March 16, 1939 to the termination of the taxable year—Mrs. Wallace spent approximately one-half of the time in San Francisco and one-half in and about Hollywood. During the time spent in San Francisco, both Petitioners read and studied plays and discussed them with authors, received her business mail, telephone calls, telegrams and performed other business activities connected with Mrs. Wallace's business at their residence in San Francisco. The respondent remarks at page 14 of the Brief that these activities occurred *after* the termination of her employment and residence in Hollywood. There are two simple answers to that remark: First, it is not accurate as Respondent has overlooked the fact that these activities took place during the month of April which was before the making of the picture for which Mrs. Wallace was engaged; during the month of July—that is, during an hiatus in the making of the picture; as well as after the picture was completed early in September. Second: The activities obviously took place within the taxable year and commenced almost immediately after the change of Mrs. Wallace's home from New York to San Francisco.

In the Brief filed by the Respondent, quotation is made from the case of *Coburn v. Commissioner of*

Internal Revenue, 138 Fed. (2d) 763, decided against Respondent by the U. S. Circuit Court of Appeals for the Second Circuit on November 29, 1943. That quotation (Respondent's Brief, page 12) is as follows:

> "The court there affirmed the principle that home for tax purposes is 'the place where the taxpayer is regularly employed *or customarily carries on business during the taxable year'*." (Italics ours.)

In our previous Brief, we quoted from a memorandum of the General Counsel of the Bureau of Internal Revenue the definition of "business", cited by him from the case of *Flint v. Stone Tracy Co.* (220 U. S. 107):

> "Business is a very comprehensive term and embraces everything about which a person can be employed."

We submit that, both on the law and on the facts, the Petitioner Ina Claire Wallace customarily carried on business during the taxable year at her home in the City and County of San Francisco.

II. The first numbered portion of the Petitioners' Argument in their Opening Brief discussed the intent of the Congress in its use of the words "away from home in the pursuit of a trade or business". In that portion of the Brief, we pointed out that there was nothing in the statute to indicate that Congress intended to use the word "home" in any other

than its usual sense. Our conclusion in that respect is buttressed by the *Coburn* decision above referred to wherein that Court states as follows:

> "In the ordinary meaning of the word, Mr. Coburn's 'home' was in New York, not in California. The Commissioner urges that the statute uses the word in a special 'tax sense' which compels the opposite conclusion. But nothing in the statute bears evidence of any unusual meaning."

The Court then remarks that a commuter's expenses of daily travel may well be personal expenses rather than traveling expenses within the meaning of the Revenue Act, and then for the purpose of argument, "assumes" (but does not decide) that the words of the statute may be given a special tax sense. Upon that assumption, the Court states that even in such a "tax sense", the word "home" ought to be limited to the place where the taxpayer is regularly employed or to a place where he customarily carries on business during the taxable year. The decision in the case, as distinguished from the assumption, was that Mr. Coburn's home remained in New York whether the word was construed in the usual and customary sense or in a special "tax sense". In other words, the Court having determined that Mr. Coburn's "home" was in New York—however that word was construed—did not find it necessary to decide whether or not the word "home" could be used in a special tax sense. The Respondent therefore is in error in his assumption that the *Coburn* case supports the theory that Congress intended the word "home" to

be used in other than its natural, plain, ordinary and commonly understood meaning.

It is interesting to note in passing that the Circuit Court of Appeals in the *Coburn* case based its decision squarely upon the cases of *Griesemer v. Commissioner,* 10 B.T.A. 386 and *Brown v. Commissioner,* 13 B.T.A. 832, both of which cases were cited in the Petitioner's Opening Brief and which cases use the word "home" in its ordinary sense as meaning the usual place of abode.

III. In their Opening Brief, Petitioners discussed at some length the two conflicting rules laid down by the Bureau of Internal Revenue and reflected in decisions of the Tax Court of the United States and its predecessor, the Board of Tax Appeals. We referred to those rules as the *Greisemer Rule* and the *Bixler Rule,* and remarked that we saw no possibility of co-ordinating the two rules by any process known to us.

The Respondent in his Brief (p. 18) denies that there has evolved two conflicting rules and as a reply to our allegation points out that some of the cases decided under one rule sometimes refer to cases decided under the other rule. The gist of the Respondent's argument is that each of the cases was decided upon its own facts, and, therefore, there is no conflict. While the question of a conflict is perhaps not of great importance, we simply point out that in the General Counsel's Memorandum quoted in our Open-

ing Brief, a golf professional *without any established place of business* was permitted to deduct all of his living and traveling expenses while he was away from his home playing in golf tournaments and exhibitions, whereas a traveling salesman whose only home was a hotel room in Buffalo was held to have no home, and therefore was not permitted a deduction. (*Duncan v. Com.,* 17 B.T.A. 1088.) There may be some means of distinguishing the two cases, but if so we are unable to define it.

IV. Respondent's Brief is principally devoted to an attempt to distinguish the cases at bar from the case of *Coburn v. Commissioner,* supra. In its attempt, the Respondent cites the *Duncan* case, the *Priddy* case, the *Tracy* case, the *Lindsay* case—all of which were referred to in our Opening Brief and all of which follow the so-called *Bixler Rule.*

As we have remarked above, the Circuit Court of Appeals of the Second Circuit placed its decision squarely upon the Board of Tax Appeals decision in the *Griesemer* and *Brown* cases and not upon the cases cited by the Respondent. The Respondent then goes so far as to suggest the *Coburn* case as authority for its position in the cases at bar. A reference to the Brief filed by Respondent in that case indicates that every argument presented by the Respondent in this case (except only those relating to the domiciliary and community property laws of the State of California) was presented to the Circuit Court

in the *Coburn* case, and that the cases relied upon in Respondent's Brief in the case at bar were cited to the Court in the *Coburn* case in support of Respondent's similar position in that case. For the convenience of the Court, we set forth in the Appendix the Index and Citations, the Statement of the Questions Presented, and excerpts from the Argument stating the Respondent's position, all taken from his Brief in the *Coburn* case.

The fact is that the Circuit Court of Appeals in the *Coburn* case decided against the Respondent upon the authority of the *Griesemer* and *Brown* cases, which cases were decided upon a construction of the word "home" consonant with its usual and ordinary meaning. That Court decided that, while Mr. Coburn was employed in California during some 263 days of the year, nevertheless his usual place of abode and the place where he customarily carried on business (as distinguished from his place of temporary employment), was New York City. In the case at bar, the Petitioner Ina Claire Wallace had her usual place of abode at San Francisco, and there she customarily carried on her business.

In support of his position, the Respondent strains to indicate a factual difference between the *Coburn* case and the cases at bar. Let us see what parallelism there is in the facts of the two cases. Both Mr. Coburn and Mrs. Wallace were famous actors. Mr. Coburn had never before acted in motion pictures; Mrs. Wallace had done so some eight years before. Mr. Coburn had never resided in California; Mrs. Wal-

lace had resided in California for two or three years prior to 1930. Mr. Coburn made five pictures and spent 263 days in Los Angeles during the taxable year; and Mrs. Wallace made one picture and was engaged for a period of two weeks in one that was unfinished and spent not more than 180 days in Los Angeles. Mr. Coburn's earnings derived from work in the pictures were many times larger than those received from his activities connected with the legitimate stage; Mrs. Wallace's earnings were computed on the basis of her normal earnings on the legitimate stage. Mr. Coburn's activities in Hollywood were interrupted by a few weeks spent in directing a play in New York State; Mrs. Wallace's Hollywood activities were interrupted by her return to San Francisco to read plays and prepare for her appearance on the legitimate stage in the following year.

The principal difference between the facts in the *Coburn* case and those in the case at bar would seem to be that Mr. Coburn intended to and did return to the same home he had maintained for years in New York City, whereas Mrs. Wallace intended to return to her home in New York City until after March 16, 1939 (the date of her marriage) and thereafter intended to and immediately did return to her newly established home in San Francisco. Neither of the parties intended to reside in Hollywood and in neither case was their residence there of a permanent nature. The Circuit Court of Appeals for the Second Circuit has, we believe, properly stated the rule to be applied in cases of this character, by its reference to the fact that Mr. Coburn's

263 days in California "did not wrest him from New York City permanently even in a professional sense". This statement is but another way of stating that the taxpayer should be permitted the deductions when he is away from his usual place of abode—that is, from the place where he usually resides. The word "home" connotes a permanent establishment—something more than a temporary residence taking during the period required for a temporary job. Any other construction of the statute cannot but have the effect urged in our Opening Brief of making the word "home" mean wherever a person is at that moment engaged in business, however temporary.

We submit that upon the authority of the *Coburn* case as well as upon the authority of *Griesemer v. Commissioner,* supra, and *Brown v. Commissioner,* supra, the cases upon which the *Coburn* case was based, the order of the Tax Court should be reversed.

V. The fifth portion of Petitioners' Opening Brief was entitled:

"5. THE EARNINGS OF BOTH PETITIONERS ARE COMMUNITY PROPERTY UNDER THE CONTROL AND MANAGEMENT OF THE HUSBAND: THE HOME, DOMICILE AND PLACE OF BUSINESS OF THE COMMUNITY WAS SAN FRANCISCO, CALIFORNIA."

In answer to the authorities there cited, the Respondent states at page 19 of his Brief that the community property laws of California have no relevancy to the question at issue. In apparent support of this remarkable statement, the Respondent cites the cases of *Com-*

missioner v. Greene, 119 Fed. (2d) 383—a decision of this Court; and *United States v. Pelzer,* 312 U. S. 399. Both of these cases have to do with gift tax. They are apparently cited by Respondent in support of his proposition that the Revenue Laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation—uniform in its application. These two cases are certainly no answer to the arguments and authorities cited in the Petitioners' Opening Brief. Every married taxpayer in the State of California and every employee of the Bureau who ever had anything to do with income tax returns from California, knows that the community property laws of California very materially affect the income tax laws of the United States for the simple reason that ownership and control of earned income within the State of California is different than in the great majority of states which follow the common law and do not have the institution of community property. The Respondent does not seem to realize that under California statutes the earnings of both spouses belong equally to each at the moment the money is earned and from that moment all of that money is under the control and management of the husband. There is nothing in the statutes of California or in any of the cases to indicate that the interest of the spouses is only in "net", as distinguished from "gross", earnings or that the interests of the spouses attaches only to that portion of the income left after the taxing authorities have levied and collected taxes. The interests of the spouses, on the contrary, are, in the language of the

statute, "present, existing and equal" and attach the moment the money is earned, not at some later date.

Likewise both spouses are chargeable with debts incurred by the community. In California, the spouses are not two separate persons engaged in individual enterprises who balance their accounts at the end of the year and then have an equal interest in what remains. They are, as was suggested in our Opening Brief, joint adventurers.

In support of the same proposition, the Respondent also cited the cases of *Herder v. Helvering,* 106 F. (2d) 153 and *Stewart v. Commissioner,* 95 F. (2d) 821.

The *Herder* case arose from Texas—a state having community property laws somewhat similar to those of California. The case arose after the death of the husband and had to do with the deduction of bad debts. The point of the case seems to be that, inasmuch as the debts became worthless upon the death of the husband, they could not be charged off on the return made by his executors after his death. As bad debts can only be charged off by a taxpayer who keeps books and as the wife kept no books (either before or after the death of her husband), the Court held that the bad debts could not be charged off her return. We can find nothing in the case which supports the proposition for which Respondent apparently cites it.

The *Stewart* case is also a case arising from Texas. In that case, the husband conveyed future income to

his wife as a separate estate, and the Court very properly held that under Texas decisions, community property may be assigned as a separate estate, but it must be an existence at the time the assignment is made. Obviously community income not yet in existence cannot be assigned and therefore the assignment did not relieve the assignor from income taxes due thereon. The wife attempted to deduct all of the expenses from her income tax return rather than divide them equally between herself and her husband. In this connection, the Court stated:

> "Since one-half of the community income is to be taxed to the husband, it follows that the applicable deductions should also be divided between the husband and wife. *Lucas v. Earl,* 281 U.S. 111, 50 S. Ct. 241, 74 L. Ed. 731; *Turbeville v. Commissioner,* 5 Cir., 84 F2d 307, certiorari denied 299 U. S. 581, 57 S. Ct. 46, 81 L. Ed. 428. The net result is the important thing in applying the income tax laws. Income and deductions must be accounted for on the same basis. In making separate returns, a husband and wife domiciled in Texas are each required to report one-half of the income *which simultaneously with its receipt becomes community property. Hopkins v. Bacon,* 282 U. S. 122, 51 S. Ct. 62, 75 L. Ed. 249." (Italics ours.)

The case would therefore seem to be authority for the propositions advanced in the Petitioners' Brief, rather than those advanced in the Respondent's Brief.

In the concluding paragraph of his Brief, the Respondent refers to Section 24 (a) (1) of the Internal

Revenue Code and the prohibitions therein of deductions "in any case" for personal living or family expenses. That section applies to deductions of living expenses at the usual place of abode, and there is in this action no suggestion of any such deductions. The deductions contended for in this case are specifically permitted under Section 23 (a) (1), which section is quoted in both the Respondent's and the Petitioners' Briefs heretofore filed. The use of the words "in any case" in quotation marks in an endeavor to impress those words upon the Court, is obviously inaccurate in view of the clear wording of Section 23 (a) (1).

CONCLUSION.

The fundamental question to be determined in all income tax cases where deductions are claimed is whether or not the taxpayer is attempting to escape taxation upon net income. As stated by Circuit Judge Holmes in the *Stewart* case, supra,

> "The net result is the important thing in applying the income tax laws."

Professor Griswold states it in the following language:

> "The fundamental fact is that Congress has given every indication that what it intends to tax is net income; and a construction which leads in substance to a tax on gross income is just as inconsistent with the statute as one which allows the taxpayer to receive income free from tax."
>
> *Appendix,* Opening Brief.

In the case at bar, the taxpayer Ina Claire Wallace maintained her home and her residence and her usual place of business, with the expense connected therewith, in the City of New York until March 16th, 1939, and thereafter both Petitioners maintained their home, their residence and their place of business, with the expense connected therewith, in the City of San Francisco. The expenses for which deductions were claimed in the income tax returns of Petitioners were incurred in addition to the normal expense of the maintenance of the Petitioners' usual place of abode. They were a proper and necessary charge against gross income. Petitioners reported and paid taxes upon their full and complete net income.

We respectfully submit that the decision of the Tax Court was erroneous and should be reversed.

Dated, San Francisco,
January 24, 1944.

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(Appendix Follows.)

Appendix.

Appendix

EXCERPTS FROM BRIEF FOR RESPONDENT COMMISSIONER.
COBURN v. COMMISSIONER.

No. 18

In the United States Circuit Court of Appeals for the Second Circuit

Charles D. Coburn,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.

On Petition for Review of the Decision of the United States Board of Tax Appeals.

BRIEF FOR THE RESPONDENT.

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INDEX

CITATIONS

QUESTIONS PRESENTED.

1. Whether the taxpayer is entitled, under the provisions of Section 23 (a) (1) of the Revenue Act of 1938, to deduct as ordinary and necessary business expenses for the taxable year 1938 the amounts he expended for meals, lodging and living expenses during that year while he was in California for the purpose of acting in certain motion pictures, even though he maintained a residence elsewhere.

2. Whether the taxpayer is entitled, under Section 23 (1) of that Act, to a deduction for depreciation on his personally-owned automobile used as a means of conveyance between his residence and the motion picture studios.

The Board, affirming the Commissioner's determination, held substantially that determinative of whether the taxpayer is entitled to the deductions claimed under this issue is the statutory meaning of the word "home" in Section 23 (a) (1) of the Revenue Act of 1938 (Appendix, *infra*); that the taxpayer could not maintain his place of residence at a point where he was not engaged in carrying out his trade or business and deduct his living expenses while away from such residence; that the facts conclusively establish that the taxpayer was engaged in carrying on the trade or business of motion picture actor throughout the year 1938 at Los Angeles, California, which required his presence there while so acting; and that therefore the claimed deduction repre-

sented, not a business expense but, personal expenses which are not deductible. (R. 17-18.) We submit that the Board was correct in so holding and, therefore, its decision should be affirmed by this Court.

The foregoing is true for the reason that the term "home" as used in Section 23 (a) (1) of the statute, as interpreted by Article 23 (a)-1 of the pertinent Regulations, is to be distinguished from domicile. The former has been construed for tax purposes to mean the taxpayer's principal place of business, post of duty or place of employment where his presence is required while earning his livelihood, as the Board stated. (R. 17, 18.) Such statutory "home", therefore, could not be in some other place where he merely maintains an apartment or other residence without reference to the location of or carrying on his trade or business. *Duncan v. Commissioner,* 17 B. T. A. 1088, affirmed *per curiam,* 47 F. 2d 1082 (C. C. A. 2d) (where the taxpayer, a traveling salesman, maintained no permanent home but traveled on a roving commission with headquarters wherever he happened to be, and it was held that he was not entitled to deduct the year's expenses for meals, lodging, etc.); *Lindsay v. Commissioner,* 34 B. T. A. 840 (where the hotel expenses incurred by a member of Congress while attending Congressional sessions in Washington and his railroad fares to and from Brooklyn, New York, where he maintained a residence, to confer with his constituents, were held not

to be deductible because Washington, the seat of the Government, was his home within the meaning of the statute and Regulations for tax purposes); *Bixler v. Commissioner,* 5 B. T. A. 1181; *Peters v. Commissioner,* 19 B. T. A. 901; *Tracy v. Commissioner,* 39 B. T. A. 578 (where the taxpayer, a motion picture actor, unsuccessfully sought to deduct the cost of meals and lodging while in California in pursuit of his vocation or business as a professional actor, even though he maintained another residence in Pennsylvania); *Priddy v. Commissioner,* 43 B. T. A. 18, petition for review dismissed July 23, 1941 (C. C. A. 5th); I. T. 3314, 1939-2 Cum. Bull. 152.

In determining the amount of allowable deductions for expenses for meals and lodging, the "home" contemplated by the statute and Regulations is that maintained by a taxpayer for the purpose of carrying on the business in connection with which the deduction for the expenses is claimed. O. D. 1021, 5 Cum. Bull. 174 (1921); O. D. 905, 4 Cum. Bull. 212 (1921). In the present case, therefore, the taxpayer's statutory home was that maintained in Los Angeles where his income-producing business is located. Consequently, his living and related expenses incurred in that city where he kept his residence in connection with the pursuit of his vocation or business were, regardless of the maintenance of another apartment in New York City unrelated to his business, personal, living or family expenses which are not deductible in computing income. Section 24 (a) (1), Revenue Act of 1938: Article 24-1, Treasury Regulations 101; I. T. 1355, I-1 Cum. Bull. 194 (1922).